Supreme Court, U.S.
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No. OFFICE OF THE CLERK
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In The
SUPREME COURT OF THE UNITED STATES

LARRY GREEN,
Petitioner

v.

FIDELITY INVESTMENTS,
Respondent

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's decision in *Gross v. FBI Fin. Services, Inc.*, 129 S.Ct 2343 (2009), does the plaintiff now need to show that age was the "but for" cause of the adverse decision in order to establish a prima facie case?

2. Does the three-part evidentiary framework set forth *in McDonnell Douglas v. Green*, 411 U.S. 792 (1973) apply to claims brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*?

PARTIES TO THE PROCEEDING

The parties to this case are Petitioner Larry Green and Respondent Fidelity Investments.

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OPINIONS BELOW

The decision of the Sixth Circuit issued March 15, 2010 is set forth in the Appendix at page 1a. The May 25, 2010 Order denying Petitioner's petition for rehearing is set forth in the Appendix at page 16a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on March 15, 2010. A timely petition for rehearing was denied on May 25, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides that:

"It shall be unlawful for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age. . ."

STATEMENT OF THE CASE

Petitioner Larry Green (Plaintiff) was 52 years-old when Dina Rulli, his 32 year-old supervisor, fired him. Rulli said Plaintiff took credit for a lead that he did not deserve. Plaintiff denied any inappropriate conduct.

Plaintiff was not replaced by a younger employee and there was no similarly situated employee who engaged in the same alleged misconduct. However, there was substantial evidence showing that Rulli's decision was motivated by age bias. Rulli liked and favored her younger subordinates but treated the older employees adversely. Rulli seized upon a disputed event to justify Plaintiff's dismissal.

The Sixth Circuit held that Plaintiff could not make out a prime case of age discrimination because there was no evidence suggesting that his age was the "but for cause" of the termination. However, in *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308 (1996), this Court held a plaintiff need only present evidence that is "adequate" to create an inference of discrimination. There is no requirement that an employee meet the ultimate burden of proof at the prima facie stage of the case.

Plaintiff seeks review of the panel's erroneous opinion to allow the Court to address two broader questions: First, in light of the Court's

decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct 2343 (2009), does the evidentiary framework set forth in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973) apply to claims under the ADEA? Second, if *McDonnell Douglas* applies, did the Court in *Gross* establish new and heightened standard to measure whether a prima facie case has been established?

A. Facts

Plaintiff began his employment with Fidelity in September of 1999. (RE No. 33, Green depo. at 47). He worked in various customer service and sales roles. He was licensed to sell securities and other investment products.

In May of 2005, Plaintiff transferred to the Investments Team supervised by 32 year-old Dina Rulli. (RE 33, Green depo. at 115-16; RE 34, Rulli depo. at 6). Plaintiff went Rulli's team because he wanted to work the Sunday to Wednesday shift. Rulli had no control over who joined her team or Plaintiff's transfer. (RE 34 at 48-49, 53, 181-82).

Plaintiff was a top performer on Rulli's team. He won sales contests and received multiple customer service awards. In late 2005, Plaintiff's teammates voted him the "Team All Star." (RE 34 at 100). In February of 2006, Plaintiff received the highest bonus payout available for the previous quarter. (RE No. 39, Green Declaration, ¶ 3).

By March of 2006, Rulli had listened to between 75 and 100 of Plaintiff's calls. (RE 34 at 102). She admitted that before then, she never heard anything that caused her to believe that Plaintiff was improperly claiming leads. (Id. at 102, 119).

In March of 2006, Rulli attended a managers' meeting where one of Plaintiff's customer calls was played. (RE 34 at 111). A question was raised regarding whether Plaintiff took credit for a lead without asking the customer all of the required questions. (Id. at 112-114).

Rulli met with Plaintiff and played a portion of the call in question. (RE 33 at 215). Plaintiff acknowledged that he claimed a lead, but did not recall the circumstances. Once Plaintiff had the chance to review his notes, Plaintiff recalled that he had used the lead process to notify the Income Planning Department that it needed to follow-up with the existing client. (Id. at 219-226). Plaintiff had been advised by a person in the Income Planning Department that sending a lead was the best way to notify them that action was needed. (Id.). Plaintiff told Rulli that she could delete the lead from his total. (Id. at 227, 235). He had no incentive to falsify the lead or take credit for it. He had all the leads he needed. (Id. at 226-27, 236, 281). Plaintiff was simply trying to do what was in the best interests of the client and Fidelity. (Id. at 230-31).

Despite never previously hearing anything in Plaintiff's calls that gave rise to any concerns about his leads, Rulli claimed that she listened to additional recorded conversations between Plaintiff and customers. (RE 34 at 126-27). According to Rulli, Plaintiff improperly took credit for several other recent leads. Rulli never allowed Plaintiff to hear the additional calls and never gave him the opportunity to explain his conduct. (RE 33 at 239, 242-43; RE No. 34 at 142-43).

Rulli acknowledged that she had discretion to decide whether Plaintiff would be terminated. (RE 34 at 177). Rulli had never disciplined Plaintiff in the past. (RE 34 at 101). Still, she chose the harshest action available and fired Plaintiff.

Within two days of his dismissal, Plaintiff complained to Fidelity's Human Resources Department that Rulli fired him because he was "not 25 years-old and didn't wear tight pants." (RE 34, Ex. 9). Plaintiff's assertion of age discrimination was well-founded and fully supported by the evidence. While Rulli did not make any comments showing her dislike for older employees, it was evident in her actions. The record below was full of facts, many of them undisputed, from which jurors could have concluded that Rulli harbored age bias.

For example, Plaintiff testified that young Rulli played to the younger employees and tried to be like them. (RE 33 at 151). Rulli's department was arranged so that younger employees were situated closer to her. (RE 30 at 12).

Plaintiff observed that younger employees were taken to a coaching room with Rulli, but that older employees were not receiving her assistance, coaching or answers to their questions. (RE 33 at 166, 178-79). Rulli was far more interested in the younger employees.

Rulli nominated a young subordinate and team-member, Nate Parkhouse, for two prominent discretionary awards that he arguably did not deserve. (RE 33 at 97,152, 159-60).

While Rulli showed a penchant for favoring younger employees, she treated older employees adversely.

When 48 year-old Debbie Collins asked Rulli to sit next to her so Rulli could listen to some of her calls and help Collins do a better job, Rulli refused. Instead, a younger employee sat next to Rulli. (RE 39 at ¶¶ 8-9).

60 year-old Bill Harland, another protected-age employee on Rulli's team, testified that Rulli did not want to be around older employees. (RE No. 30, Harland depo. at 6, 12).

In February of 2006, Rulli fired Debbie Collins after Collins used a client's password, at the client's request, to access information about his account. (RE 39, ¶ 9). As noted above, Collins was 48. She was not aware of any policy that prohibited her from using the client's password with the

client's consent. Collins thought she was providing good customer service. (Id).

Rulli had also disciplined 46 year-old Tamara O'Brien and had threatened her with termination. (RE 33 at 272; RE 34 at 91). O'Brien was a veteran who did well before Rulli became her manager. (RE 32 at 16, 21).

In her short time over the Investments Team, Rulli fired two employees over the age of 40 – Collins and Plaintiff – and had threatened a third, Tamara O'Brien, with dismissal.[1]

B. The Decisions Below

Following his termination, Plaintiff filed suit in the United States District Court for the Southern District of Ohio. He alleged, among other things, a claim for discrimination in violation of the ADEA. The district court granted summary judgment. Plaintiff appealed.

On March 15, 2010, a panel of the Sixth Circuit affirmed the district court's decision. The panel held that Plaintiff could not establish a prima facie case. (Panel Decision, Appendix at 11a-12a). The panel resisted Plaintiff's attempt to meet his initial burden through an array of circumstantial evidence including favoritism toward younger employees and adverse treatment

[1] It was undisputed that Rulli did not terminate any employees under the age of 40. (RE 34 at 110).

of older team members. The panel cited Sixth Circuit precedent requiring proof of replacement by an employee outside the protected age group or favored treatment of a similarly situated employee outside the protected group. (Panel Decision, Appendix at 11a-12a). The panel stated that even if it applied a more forgiving prima facie standard that, Plaintiff did not present evidence suggesting that age was the "but for" cause of his termination. (*Id.* at 12a).

Plaintiff sought rehearing. His petition was denied on May 25, 2010. (Order, Appendix at 17a).

REASONS FOR GRANTING THE WRIT

As set forth more fully below, this case provides a vehicle for the Court to address and clarify several important and timely issues regarding the nature and amount of proof required to establish a prima facie case under the ADEA.

First, this case allows the Court to answer questions that have arisen in the wake of *Gross*. For example, if the *McDonnell Douglas* framework remains applicable, does *Gross* affect the amount of proof needed to establish a prima facie case under the ADEA? Must a plaintiff, as the Sixth Circuit suggests, now present enough evidence at the prima facie stage to show that age was the "but for" cause of the adverse action?

Second, this case provides the opportunity to clarify the nature and amount of proof that is sufficient to establish a prima facie case of age discrimination. While this Court held in *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308 (1996) that a plaintiff need only present evidence that is "adequate" to create an inference of discrimination, the Sixth Circuit stated that a plaintiff must show, among other things, that he or she "was replaced by someone outside the protected class or treated differently from a similarly-situated employee outside the protected class." (Panel Decision, Appendix at page 10a).

The Court should correct the Sixth Circuit's erroneous statement of the law. Age discrimination can occur without a replacement. A boss motivated by age bias can simply get rid of an older employee and seek no replacement. This is especially true where as here, the function is accomplished by a "team" of employees taking random incoming calls and employees join the team based on their desire for a particular shift. Age discrimination can also occur even in the absence of a younger comparator. A boss who is looking to terminate an older employee can use the first indiscretion as the pretext to hide an illegal motive. The lack of a similarly situated younger employee does not negate the pre-existing discriminatory animus.

Finally, this case presents the Court with the opportunity to decide a question it has repeatedly asked but never answered: Does the evidentiary framework set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) apply to the ADEA? In light of the decision in *Gross* and resulting uncertainty present in the lower courts, this is a question best answered now.

A. The Court Should Clarify Whether A Prima Facie Case Under The ADEA Now Requires A Showing That The Adverse Action Would Not Have Been Taken "But For" The Employee's Age

In *Gross*, the Court held that, unlike mixed motive claims under Title VII, the burden of proof in a case brought under the ADEA never shifts to the employer. 129 S.Ct at 2352. The Court also held that as used in the ADEA, the term "because of" means that age must have been the "but for" cause of the decision; showing that age was one motivating factor is not enough. *Id.*

The Sixth Circuit held that Plaintiff failed to establish a prima facie case. The panel stated that it saw no need to apply a more flexible standard than *McDonnell Douglas*, and that even if it did, Plaintiff would still not be able to show that age was the "but for" cause of his termination. (Appendix at 11a-12a). The court made its determination in the context of the prima facie

case. It did not reach the issue of pretext. (Appendix at 12a, n.4).

In *Gross*, the question of whether the plaintiff established a prima facie case was not at issue. As a result, the Court did not review address one of the questions presented here: To establish a prima facie case under the ADEA, does the employee need to present evidence suggesting that age was the "but for" cause of the adverse decision?

This Court has long-recognized that "the burden of establishing a prima facie case is . . . not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) and *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 312 (1996), citing *Teamsters v. U.S.*, 431 U.S. 324, (1977). A prima facie case only requires "evidence adequate to create an in inference that an employment action was based on an illegal discriminatory criterion." *O'Connor*, 517 U.S. at 312.[2]

The prima facie case eliminates the common, legitimate reasons for an adverse employment action and creates a legally mandatory

---

[2] It has been stated that the requisite degree of proof "necessary to establish a prima facie case . . . on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). *See also Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987), *cert. denied*, 498 U.S. 939, 111 S.Ct. 345, 112 L.Ed.2d 309 (1990).

rebuttable presumption of discrimination. *Burdine*, 450 U.S. at 254. Once a prima facie case is established, the employer is required to articulate a legitimate non-discriminatory reason for its conduct. *Id.* at 254.

Despite this Court's directives regarding the minimal burden required to present a prima facie case, the Sixth Circuit held Plaintiff to a higher standard. While nominally applying *McDonnell Douglas*, the Sixth Circuit appeared to merge the minimal proof required to establish a prima facie case with the ultimate question of discrimination. The court held that Plaintiff failed to present evidence at the prima facie stage to suggest that age was the "but for" cause of his termination.

In *Bell v. Raytheon Co.*, 2009 WL 2365454 (N.D. Tex. July 31, 2009), the court reached a similar conclusion. After acknowledging that Bell had successfully met the elements of *McDonnell Douglas*, the court granted summary judgment without requiring the employer to even state a reason for dismissal:

> "Although the plaintiffs have stated a prima facie case of age discrimination, the court need not reach stage two because the plaintiffs have not shown by a preponderance of the evidence that age was the but-for cause of Cox's non-selection. The motion for summary judgment on this claim is therefore granted."

Id. at *5.

Requiring an employee to prove that age was the "but for" cause of the adverse action at the prima stage of the case is directly at odds with this Court's precedent. The prima facie case is designed simply to create an "inference" that age could have played a role in the adverse decision. *O'Connor*, supra at 312. On the other hand, the "but for" standard adopted in *Gross* addresses the ultimate issue of discrimination – a question that is answered only after the employer articulates the basis for the adverse action.

In addressing this question, the Court is also presented with the opportunity to confirm that proof of the specific *McDonnell Douglas* elements is not required to establish a *prima facie* case of discrimination. In *Teamsters, supra*, the Court clearly rejected such a rule:

> "The company and union seize upon the *McDonnell Douglas* pattern as the *only* means of establishing a prima facie case of individual discrimination. Our decision in that case, however, did not purport to create an inflexible formulation. We expressly noted that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing

factual situations." *Id.*, at 802 n. 13."

Teamsters v. *United States,* 431 U.S. at 358. (emphasis in original). The Court also made it clear that:

> "The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act "

Id.

In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court reiterated that "the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Id.* at 512 *citing Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The degree of flexibility in establishing a prima facie case was aptly stated by the Seventh Circuit in *Carson v. Bethlehem Steel Corp.* 82 F.3d 157 (7th Cir. 1996):

> "Any demonstration strong enough to support a judgment in the plaintiff's favor if the employer remains silent will do, *even if the proof does not fit into a set of pigeonholes*."

Id. at 159 (emphasis ours).

Despite the foregoing, and despite the fact that Plaintiff made it clear that he was not attempting to establish a prima facie case based on the *McDonnell Douglas* elements, the Sixth Circuit stated that it "routinely affirms the grant of summary judgment for failure to establish a *prima facie* case based on the *McDonnell Douglas* criteria." (Appendix at 11a). The court held that the fact that Plaintiff was not able to meet the *McDonnell Douglas* formula "is not itself sufficient reason to dispense with this test in favor of a more forgiving standard." (*Id.* at 12a).

In fact, Plaintiff did not ask the court to apply "a more forgiving standard." In accordance with this Court's precedent, Plaintiff sought to establish a prima facie case by presenting circumstantial evidence that created an inference he was terminated based on his age. As set forth above, Rulli harbored age bias. It was evident in Rulli's desire to be around and help younger employees, the favoritism she showed for her young contemporaries, and the adverse treatment she directed at Plaintiff, Collins and O'Brien.

B. There Is A Disagreement Among The Circuits Regarding The Nature Of Proof Necessary To Meet The Fourth Prong Of The *McDonnell Douglas* Test

The first three elements of the *McDonnell Douglas* prima facie test tend to eliminate the most obvious legitimate defenses in a discrimination case. Clearly, an employee must be part of the protected class, must generally possess the basic qualifications for the position, and must suffer an adverse action. However, the courts are divided as to the nature and type of evidence sufficient to satisfy the fourth element.

In *Rivera Aponte v. Restaurant Metropol No. 3, Inc.*, 338 F.3d 9 (1st Cir. 2003), the First Circuit held that the fourth element is satisfied when:

> "(4) the employer did not treat age neutrally. *Pages-Cahue v. Iberia Líneas Aéreas de España*, 82 F.3d 533, 536 (1st Cir.1996). The fourth element requires the plaintiff to produce "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996) (quotation omitted)."

The Second Circuit has set forth an equally

broad test. An employee can satisfy the fourth prong by showing that the adverse employment action "*occurred under circumstances giving rise to an inference of discriminatory intent.*" *Terry v. Ashcroft*, 336 F.3d 128, 138 (2nd Cir. 2003)(emphasis ours).

The Seventh Circuit has stated that the an employee can meet fourth element of *McDonnell Douglas* by demonstrating that the employer replaced him with someone substantially younger or that there is "*other such evidence that indicates that it is more likely than not that his age . . .was the reason for the adverse employment action.*" *Robin v. Espo Engineering Corp.*, 200 F.3d 108, 1090 (7th Cir. 2000) (emphasis ours).

Unlike the flexible language and standards set forth above, the Sixth Circuit stated that to set forth a prima facie case, "a plaintiff must establish that he or she was: 1) a member of the protected class (i.e., at least forty years old); 2) subject to adverse employment action; 3) qualified for the position; and 4) replaced by someone outside the protected class or treated differently from a similarly-situated employee outside the protected class." (Panel Decision, Appendix at page 10a, *citing Geiger v. Tower Auto.*, 579 F.3d 614, 622 (6th Cir. 2009).

The formulation stated by the Sixth Circuit is contrary to this Court's holding in *O'Connor*. There is no requirement under the ADEA that a

replacement or comparator be "outside the protected class."

Clearly, replacement by a substantially younger employee or favored treatment of a substantially younger similarly situated younger employee may be evidence that creates an inference of discrimination. But these factors are not exclusive. The test stated by the Sixth Circuit forecloses a prima facie case even where other circumstantial evidence exists tending to show discriminatory intent.

For example, if the only employees terminated were in the protected class, an inference of discrimination may arise.[3] Favoritism by a young supervisor toward young subordinates in contexts other than disciplinary action, such as training, help, and nominations for discretionary awards, can also create an inference of discrimination. Expressing, by words or conduct, a desire not be around older people can be evidence supporting an inference of discrimination. The fact that a manager exercises discretion in a way that is adverse to older employees on repeated occasions

[3] In *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054 (8th Cir. 1988), the two oldest members of a nine-person department were terminated. None of the remaining non-managerial employees was over 33. The court noted this fact was "not conclusive evidence of age discrimination in itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome."

certainly would support an inference of discrimination. Yet, under the test stated by the Sixth Circuit in this case, none of the above types of relevant and probative evidence would be considered.[4]

C. The Court Should Decide Whether The McDonnell Douglas Evidentiary Framework Applies To The ADEA

In *Gross*, the Court noted that it "has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), utilized in Title VII cases is appropriate in the ADEA context." *Gross*, 129 S.Ct. at 2349 n.2. The Court has previously raised the same question, but has never addressed it. *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (assuming that the *McDonnell Douglas* framework applied to an ADEA claim where the issue was not disputed by the parties); and *O'Connor v. Consolidated Coin Caterers*, 517 at 311 (1996)(also assuming that *McDonnell Douglas* applies to age discrimination claims).

The decision in *Gross* has led to uncertainty and confusion. Courts and practitioners who have

[4] The Sixth Circuit's decision would also appear to leave no room to consider a decision-maker's comments about older employees that may show animus but do not rise to the level of direct evidence.

applied the *McDonnell Douglas* test for years face new and unanswered questions.

For example, as noted above, if the prima facie burden-shifting test applies, what amount of evidence is required to establish the prima facie test? Is the plaintiff only required to present evidence "adequate to create an inference that an employment action was based on an illegal discriminatory criterion" as set forth in *O'Connor*? 517 U.S. at 312. Or, as in this case and *Bell v. Raytheon, supra,* must employees now produce evidence at the prima facie stage sufficient to show that age was the "but for" cause of the adverse decision?

If the *McDonnell Douglas* test no longer applies, what is the effect of the Court's decision in *Reeves v. Sanderson Plumbing*? There, the Court held that an ADEA plaintiff could prevail on the strength of the prima facie case and evidence of pretext. 530 U.S. at 148 ("Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."). If the initial prima facie burden is eliminated from the equation, what role, if any, will pretext play, and at what stage of the case?

This case presents an opportunity for the Court to address this important and widely applicable legal question.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

No.

LARRY GREEN,
Petitioner

v.

FIDELITY INVESTMENTS,
Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 4,017 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1.

I declare under penalty of perjury that the foregoing is true and correct.

s/ David Torchia	8/22/2010
David Torchia	Date

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing document were served by U.S. Mail upon Kelley Schoening, Esq., Dressman, Benzinger, LaVelle, PSC, 207 Thomas More Parkway, Crestview Hills, KY 41017 on August 23, 2010.

s/ David Torchia
David Torchia

APPENDIX

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
File name: 10a0158n.06
No. 09-3247

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
March 15, 2010
LEONARD GREEN, Clerk

LARRY GREEN,	)
	)
Plaintiff-Appellant,	)
	) ON APPEAL FROM
	) THE UNITED
v.	) STATES DISTRICT
	) COURT FOR THE
FIDELITY	) SOUTHERN
INVESTMENTS	) DISTRICT OF OHIO
	)
Defendant-Appellee,	)

BEFORE: MARTIN and WHITE, Circuit Judges; ZOUHARY, District Judge *

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation

HELENE N. WHITE, Circuit Judge. Larry Green appeals from the district court's grant of summary judgment to Fidelity Investments (Fidelity), dismissing Green's claims of age discrimination, breach of contract, defamation, and tortious interference with business relationships. We affirm.

I.

The district court opinion sets forth the relevant facts:

> On September 14, 1999, Plaintiff Larry Green began working for Defendant Fidelity Investments ("Fidelity") as a financial service representative. At that time,Green signed an Employee Agreement acknowledging that his employment was at-will. While employed at Fidelity, Green became licensed by the National Association of Securities Dealers ("NASD").
>
> In May of 2005, Green transferred to Fidelity's Investments Department to work as an Investment Representative ("IR"). As an IR, Green answered calls from current and potential customers to assist them with their financial needs, and refer them to other Fidelity departments.

Green was required to "qualify" potential customers to determine which Fidelity products and services were suitable. To properly qualify a caller, an IR must ask each caller a series of pre-determined questions. When an IR determines that a caller is qualified for a particular product or service, the IR marks a "lead" in the caller's account. A lead identifies the specificproduct or service for which a caller is qualified and may be interested. Based on the type of lead designated, a Fidelity business partner who specializes in that product or service will then contact the caller to provide additional information and attempt to complete the transaction. IRs are evaluated, in part, on the number and quality of leads they generate. IRs receive monetary incentives such as bonuses, trips and other awards based on their lead volume.

As an IR, Green produced a high lead volume. Green won several sales campaigns and trips, including one to Las Vegas. Green also won several awards for customer service.

However, Green was also disciplined several times. In July of 2000, Green's supervisor at the time,

Todd Kollman, placed him on corrective action for repeatedly violating the company's break policy. In January of 2001, Green's supervisor, Dawn Brewer, issued him a "Final Written Warning" for improperly taking credit for leads. Brewer wrote: "Such inappropriate coding of calls will not be permitted . . . .Improper coding, and ultimately receiving and taking credit for leads not transferred to the Investments department . . . is unacceptable." Brewer also stated: "This warning will remain in effect for the duration of your employment with Fidelity Investments." In June of 2003, Green's supervisor at the time, Andrew Ritter, issued him another Final Written Warning for providing confidential account information to a caller whose identity he did not verify. In August of 2004, Green's supervisor, Scot Herrmann, issued him a ninety-day warning for excessive trading errors. In March of 2005, Green was placed on probation for continued excessive trading errors.

In March of 2006, [Green's supervisor, Dina] Rulli attended a training session for team managers designed to improve employee

performance. Rulli and the managers listened to a call handled by Green and questioned whether he had taken credit for a lead without qualifying the customer. Rulli met with Green and played the call for him. Green admitted that he had not discussed the criteria required to enter and obtain credit for the lead.[1]

Rulli informed Green that she planned to review more of his calls, and she asked whether she would find other such calls. Green assured Rulli that she would not.

After meeting with Rulli, Green reviewed his notes from the call.

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[1] In his deposition, Green testified:

Q: And then you agreed with her in this meeting that you should not
have taken credit for a lead, correct?

A: I shouldn't have checked the box.

Q: And by checking the lead box, that was one of the leads that then goes
into your incentives statistics. Right?

A: Right. That would have gone there.

Green recalled that he had been told that the best way to communicate with the Income Planning department was through a lead. Green wanted to be sure that the proper person from the department contacted the customer. Green approached Rulli and told her that she could delete the lead from his total.

When Rulli reviewed a sampling of Green's calls from March 2006, she found that Green had falsified leads for at least six other calls during that month. Rulli did not speak to Green about these calls. Instead, Rulli sent an email to her supervisor, Mary Svitkovich, and a human resources representative, Heidi Fortune explaining that:

> It was discovered that Larry Green has been inappropriately submitting leads, therefore obtaining credit for work not performed. Leads were submitted for business partners in Annuities, PAS (Portfolio Advisory Services), and Income Planning in instances where these products and services were never discussed with clients. This behavior is a manipulation of the

> systems to receive credit for work that was not completed. This does have an impact on review scores, quarterly bonuses, and campaign awards. This is a clear violation of our policies and procedures.

Rulli, Fortune and Svitkovich agreed that Green should be terminated for violating Fidelity policy. On March 27, 2006, Rulli met with Green and informed him that his employment was being terminated because he inappropriately submitted a lead. Green was 52 years old at the time.

Under federal securities law, Fidelity was required to submit a Form U5 to NASD within thirty days of Green's termination. Form U5 requires Fidelity to explain why the individual's registration is being terminated, and then verify the accuracy and completeness of the information. Fidelity provided the following reason for terminating Green: "[E]mployee violated department procedures byrecording leads to business partners when he did not have the requisite substantive conversations with the customers."

> In his Amended Complaint, Green claims age discrimination under the Age Discrimination in Employment Act ("ADEA") and Ohio Revised Code§ 4112.02(A).[2] Green also brings claims of breach of implied contract, defamation, and interference with prospective employment under Ohio law.

Green v. Fidelity Invs., 2009 U.S. Dist. LEXIS 9949 at *1-*7 (S.D. Ohio Feb 11. 2009) (citations omitted).

II.

We review the district court's grant of summary judgment de novo. *Moses v. Providence Hosp. & Med. Ctrs., Inc.*, 561 F.3d 573, 578 (6th Cir. 2009). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no

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[2] The elements and burden of proof of an age-discrimination claim under Ohio law parallel an ADEA claim. *Campbell v. PMI Food Equip. Group, Inc.*, 509 F.3d 776, 785 (6th Cir. 2007); *seealso Conley v. U.S. Bank Nat'l Ass'n*, 211 F. App'x 402, 409 (6th Cir. 2006) (unpublished)("Because summary judgment is proper on [appellant's] ADEA claim, his claim under O.R.C.§ 4112.02 also fails.").

genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party "bears the burden of proving that there are no genuine issues of material fact." *Phillips v. Roane County, Tenn.*, 534 F.3d 531, 538 (6th Cir. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). The non-moving party must then "come forward with 'specific facts showing a genuine issue for trial.'" *Merriweather v. Zamora*, 569 F.3d 307, 313 (6th Cir. 2009) (quoting Fed. R. Civ. P. 56(e)(2)). "When we review a motion for summary judgment, we must view all facts and inferences in the light most favorable to the non-moving party." *Hall v. Spencer County, Ky.*, 583 F.3d 930, 933 (6th Cir. 2009) (citing *Matsushita Elec.Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

A. Age-Discrimination Claim

Green contests the grant of summary judgment on his age-discrimination claim under the ADEA and the Ohio Revised Code.2 The ADEA forbids an employer to "fail or refuse to hire or to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). Green does not present direct evidence of age discrimination, but contends that he can make out a *prima facie* case based on circumstantial evidence. He presents as evidence his firing, despite being a "top performer"; the firing of another protected-age co-

worker, Debbie Collins, also for violating company policy;[3] the poor treatment of a third protected-age co-worker, Tamara O'Brien; and evidence that Rulli socialized more with younger employees.

This court applies the *McDonnell Douglas* burden-shifting framework to ADEA claims that rely on circumstantial evidence. *Geiger v. Tower Auto.*, 579 F.3d 614, 622 (6th Cir. 2009). To set forth a *prima facie* case of age discrimination, a plaintiff must establish that he or she was: 1) a member of the protected class (i.e., at least forty years old); 2) subject to adverse employment action; 3) qualified for the position; and 4) replaced by someone outside the protected class or treated differently from a similarly-situated employee outside the protected class. *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 181 (6th Cir. 2004) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). "The plaintiff retains the ultimate burden of proving that 'age was the "but-for" cause of the employer's adverse action.'" *Harris v. Metro. Gov't of Nashville & Davidson County*, 594 F.3d 476, 485 (6th Cir. 2010) (citing *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2351 (2009), and *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008)).

[3] Green concedes that Collins was fired for violating company policy. Collins used a customer's password to access account information for the client who wanted information available on-line but was not near a computer. Green claims that Collins "could have been counseled" instead of being fired. Appellant's Brief at 32.

Green concedes that he cannot establish the fourth factor, as he was not replaced and can point to no similarly-situated non-protected employee treated better than he. Green argues, however, that the district court erred by rigidly applying the *McDonnell Douglas* test and that the court should have applied a more flexible standard. Specifically, Green claims that the test is inapplicable because Rulli had "no control over who joined the team"—and thus no inference could be drawn from the fact that he was not "replaced"—and because he "did not assert that there was a similarly situated younger person who was treated better," but rather "pointed to other circumstantial evidence of discrimination." Appellant's Brief at 31.

While it is true that the *McDonell Douglas* test should not be formalistically applied, *see, e.g.*, *Birch v. Cuyahoga County Probate Court*, 392 F.3d 151, 165-66 (6th Cir. 2004), this court routinely affirms the grant of summary judgment for failure to establish a *prima facie* case based on the *McDonnell Douglas* criteria. *See, e.g.*, *Balding-Margolis v. Cleveland Arcade*, No. 09-3017, 2009 WL 3735902, at *4 (6th Cir. Nov. 9, 2009) (unpublished) (affirming summary judgment on failure to present evidence of replacement by a younger worker or more favorable treatment of a similarly situated younger employee); *Johnson v. Interstate Brands Corp.*, No. 08-6387, 2009 WL3583397, at *3 (6th Cir. Nov. 3, 2009) (unpublished) (affirming summary judgment where younger comparison employee was not similarly

situated); *Gaffney v. Potter*, 345 F. App'x 991, 993 (6th Cir.2009) (unpublished) (finding a lack of a similarly situated non-protected employee fatal to both TitleVII and ADEA claims). The fact that Green cannot establish a *prima facie* case under the framework is not itself a sufficient reason to dispense with the test in favor of a more forgiving standard. Regardless, under any standard, Green's circumstantial evidence, consisting primarily of perceived social slights and his own subjective view that his performance made the decision otherwise irrational, do not suggest that his age was the "but-for" cause of his termination.[4]

B. Breach of Implied Contract

Green next argues that the district court erred when it granted summary judgment on his breach of implied contract claim. Green contends that he observed a practice at Fidelity of progressive discipline, which created an implied contract that he would only be fired for cause. This claim is without merit as no implied contract existed. As the district court noted, "not only did Green sign an agreement stating that his employment was at-will, but Fidelity's Corrective Action Policy expressly states that 'it does not create a contract of

[4] Because we find that Green did not establish a *prima facie* case of age discrimination, we need not reach the issue whether Fidelity's stated reason for his firing was pretextual.

employment' and that 'certain conduct may warrant immediate termination.'" *Green v. Fidelity Investments*, 2009 U.S. Dist. LEXIS 9949, at *16 (S.D. Ohio Feb 11, 2009) (citation omitted). Under Ohio law, "[a]bsent fraud in the inducement, a disclaimer in an employee handbook stating that employment is at will precludes an employment contract other than at will based upon the terms of the employee handbook." *Wing v. Anchor Media, Ltd.*, 570 N.E.2d 1095, 1098 (Ohio 1991) (citation omitted); *see also Smiddy v.Kinko's Inc.*, No. C-020222, 2003 WL 203576, at *5-*6 (Ohio App. Jan. 31, 2003) (unreported).Green does not contend that Fidelity engaged in fraud in the inducement and therefore summary judgment was appropriate.

C. Defamation

Green argues that Fidelity defamed him through both statements made on the Form U5 it submitted to NASD following his termination and statements made by his supervisor within the company. The district court addressed only the first claim. Upon firing Green, Fidelity was obligated to submit a Form U5 explaining the reason for his termination. The reason given was that Green "violated department procedures by recording leads to business partners when he did not have the requisite substantive conversations with the customers." R. 24, Ex. 2 at 1-2. Green does not contest the accuracy of this statement but rather

contends that it implies a dishonest motive. However, the statement makes no mention of any alleged motive and is substantively true. Ohio Revised Code § 2739.02 provides that truth "shall be a complete defense" to an action for defamation. *Accord Ed Schory & Sons, Inc. v. Soc. Nat'l Bank*, 662 N.E.2d 1074,1083-84 (Ohio 1996).

With regard to the statements made by Rulli, Green objects to an email she sent to Svitkovitch and Fortune, stating that Green had been "inappropriately submitting leads, therefore obtaining credit for work not performed," and that his actions were a "manipulation of systems to receive credit for work not performed."

These statements are protected by qualified privilege. *See Gaumont v. Emery Air FreightCorp.*, 572 N.E.2d 747, 755 (Ohio App. 1989) ("It is well established in Ohio that communications between an employer and an employee or between two employees concerning the conduct of a thirdor former employee made in good faith concerning a matter of common interest are within the doctrine of qualified privilege."). As such, they "are not actionable absent a showing of actual malice." *Matikas v. Univ. of Dayton*, 788 N.E.2d 1108, 1115 (Ohio App. 2003) (citation omitted). To demonstrate actual malice, Green would need to show that Rulli made the statements "with knowledge that [they] were false or with reckless disregard of whether they were false or not." *Daubenmire v. Sommers*, 805 N.E.2d 571, 587 (Ohio App. 2004) (citations omitted).

Green points to no evidence from which a rational trier of fact could find actual malice. Rather, Green concedes that he violated company policy, admitted as much to Rulli, and that the reporting violation improperly gave Green credit for the lead. To survive summary judgment, Green is required to do more than simply assert that the statements were made with malice. *Arendale v. City of Memphis*, 519 F.3d 587, 605 (6th Cir. 2008) ("In order to survive summary judgment, Plaintiff cannot rely on conjecture or conclusory accusations.").

D. Interference with Prospective Employment

Green's final claim is that the statements on the Form U5 interfered with his prospective employment. The Ohio Supreme Court has held that tortious interference with business relationships occurs "when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another." *A & B-Abell Elevator Co. v.Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1294 (Ohio 1995). Again, Green points to no probative evidence beyond his assertions that no one would hire him because of the statements made on the Form U5. "A plaintiff's conclusory allegations and subjective beliefs are not a sufficient basis to deny summary judgment." *Johnson v. Interstate Brands Corp.*, No. 08-6387, 2009 WL 3583397, at *5 (6th

Cir. Nov. 3, 2009) (unpublished) (citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (1992)).

III.

Having found no error, we **AFFIRM**

Case No. 09-3247

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ORDER

LARRY GREEN

Plaintiff - Appellant

v.

FIDELITY INVESTMENTS

Defendant - Appellee

BEFORE: MARTIN and WHITE, Circuit Judges; ZOUHARY, U.S. District Judge.*

Upon consideration of the petition for rehearing filed by the Appellant, It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

Issued:
May 25, 2010

s/ Leonard Green